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CITATIONS

Cases:

554683—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 373

LADOGA CANNING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 14–20) is reported at 136 F. (2d) 523. The opinion of the district court (R. 4–6) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 22, 1943 (R. 13). The petition for a writ of certiorari was filed September 22, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Fourth Amendment to the Constitution is applicable to the seizure by court process of an article proceeded against as subject to condemnation under Section 304 of the Federal Food, Drug, and Cosmetic Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sections 304 and 402 of the Federal Food, Drug, and Cosmetic Act (Act of June 25, 1938, c. 675, 52 Stat. 1044–1045, 1046, 21 U. S. C. 334, 342) provide in part as follows:

> SEC. 304. (a) Any article of food, * * * that is adulterated * * * when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *.

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. * * *

SEC. 402. A food shall be deemed to be adulterated—(a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *.

STATEMENT

Proceeding under Section 304 of the Federal Food, Drug, and Cosmetic Act, *supra,* the United States Attorney, on April 9, 1942, filed a libel of information, entitled "Complaint," in the District Court for the Northern District of Ohio on behalf of the United States against, and for condemnation of, approximately 935 cases of Tomato Puree. In conformity with the procedure in admiralty, made applicable by the Act to such cases, the complaint prayed for the issuance of a writ of attachment and monition against the article, basing the prayer on allegations that the article had been shipped in interstate commerce by petitioner and was adulterated within the meaning of Section 402 (a) (3) of the Act in that it contained a decomposed substance as evidenced by mold (R. 2–3). In accordance with the rules of the district court and the usual procedure in ad-

miralty, the complaint was not verified.[1] Pursuant to the prayer of the complaint, the article was seized under a writ of attachment (R. 3–4).

On May 5, 1942, petitioner, appearing specially and alleging that it was the owner of the seized article and had possession thereof when it was seized, filed a motion in the district court to quash the writ of attachment and attachment and for return of the article. As ground for the motion, petitioner contended that the issuance of the writ and seizure of the article were in violation of the Fourth Amendment to the Constitution in that the warrant for the seizure issued and the seizure was made without a showing of probable cause supported by oath or affirmation. (R. 3–4.) The district court sustained the motion, dismissed the complaint, and ordered the return of the article (R. 4–6).

After the filing of a notice of appeal, the district court granted a stay of proceedings to enforce the

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[1] Petitioner does not dispute the fact, recognized by this Court in *443 Cans of Egg Product*, 226 U. S. 172, 183 (see also, *United States* v. *George Spraul & Co.*, 185 Fed. 405 (C. C. A. 6); *Eureka Productions* v. *Mulligan*, 108 F. (2d) 760 (C. C. A. 2)), that Section 304 of the Act, formerly Section 10 of the Pure Food Act, makes admiralty procedure, without an initial, executive seizure (see note 3, *infra*, p. 10), applicable up through the point of seizure of the article concerned, or the fact, shown in the opinion below (R. 16–18), that it is the general practice in admiralty not to require the verification of a libel filed on behalf of the United States (cf. *Albrecht* v. *United States*, 273 U. S. 1, 6).

judgment "insofar as the return of the goods is concerned" (R. 7). Petitioner thereupon filed a motion to modify this stay order to make it applicable only "insofar as the dismissal of the libel is concerned" (R. 7–8). The motion was denied (R. 8) and petitioner filed a similar motion in the circuit court of appeals, which was argued along with the merits of the appeal (R. 15). The circuit court of appeals denied the motion, reversed the judgment of the district court, and remanded the case for further proceedings, holding that the Fourth Amendment was inapplicable to a seizure under Section 304 of the Act (R. 13–20).

ARGUMENT

Petitioner contends that, as the district court held (R. 4–6), the seizure of the tomato puree by writ of attachment violated the Fourth Amendment to the Constitution in that the writ issued and the attachment was made pursuant to the prayer of an unverified libel of information and not upon a warrant issued "upon probable cause, supported by oath or affirmation," as required by that Amendment. In support of this contention, petitioner relies entirely upon the decisions of this Court in *Boyd* v. *United States,* 116 U. S. 616, and *Carroll* v. *United States,* 267 U. S. 132 (Pet. 4–8), both of which, we submit, refute, rather than support, the contention.

Petitioner's reliance upon the *Boyd* case is predicated upon the erroneous assumption that

the statute involved in that case is analogous to Section 304 of the Federal Food, Drug, and Cosmetic Act (*supra*, pp. 2–3). (See Pet. 6–7.) The proceeding in the *Boyd* case was one for forfeiture of goods under Section 12 of the Act of June 22, 1874, which provided that for the offense of bringing in goods into the United States in violation of the customs laws the *offender* might be punished by a fine of from $50 to $5,000, or imprisonment for not exceeding two years, or both, and that, in addition to such fine, "such merchandise shall be forfeited." The question in that case was whether the defendant's rights under the Fourth and Fifth Amendments to the Constitution had been violated by the introduction in evidence, over the objection of the defendant, of an invoice produced by the defendant upon demand of the United States Attorney pursuant to Section 5 of the same Act. That section provided that in a proceeding other than criminal arising under the revenue laws the attorney representing the United States might request the production by the defendant of pertinent papers and if the papers were not produced the attorney's statement of their context would be taken as true. Predicating its decision upon the premise that a forfeiture proceeding under Section 12 of that Act was criminal in nature,[2]

[2] The Court said (p. 634):

"In this very case, the ground of forfeiture as declared in the 12th section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against

this Court held that the compulsory production of papers in such a proceeding was in effect an unlawful search and seizure and required the defendant to produce evidence which might tend to incriminate him.

The situation in the instant case, both as to the article seized and the type of proceeding in which it was to be used, is altogether different. The Federal Food, Drug, and Cosmetic Act has distinct criminal and condemnation provisions, Section 303 of the Act (21 U. S. C. 333) providing for criminal penalties and Section 304 (*supra,* pp. 2–3) for seizure and condemnation of the offending article. The latter section is, by its express terms, made a proceeding *in rem* against the article itself, and the condemnation which results from such a proceeding is no part of the crimi-

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the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared, that the offender shall be fined not exceeding $5,000, nor less than $50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one."

nal penalty imposable upon the person introducing the article in interstate commerce. A proceeding under the section is therefore civil, not criminal, in character (see *443 Cans of Egg Product,* 226 U. S. 172; *Lilienthal's Tobacco* v. *United States,* 97 U. S. 237; *Dobbins's Distillery* v. *United States,* 96 U. S. 395, 399; *Eureka Productions* v. *Mulligan,* 108 F. (2d) 760 (C. C. A. 2); *United States* v. *Three Tons of Coal,* 28 Fed. Cas. No. 16515), and the seizure authorized is one which is for the purpose of obtaining jurisdiction over the *res,* not to secure evidence against the owner of the article. It follows that the holding of the *Boyd* case, that the compulsory production of papers which might tend to incriminate the defendant in a proceeding which is criminal in nature, does not support the conclusion that the Fourth Amendment to the Constitution applies to a seizure under Section 304 of the Federal Food, Drug, and Cosmetic Act.

Nor does the decision of the Court in *Carroll* v. *United States,* 267 U. S. 132, aid petitioner's contention. That case involved a *search* of an automobile for contraband liquor, and the question there was whether the liquor found through the search might constitutionally be introduced in evidence in a *criminal* prosecution.

In contrast to the main holdings of both the *Boyd* and *Carroll* cases, both decisions in effect recognize the validity of the seizure in the instant case. For the purpose "of showing the principle on which the Fourth Amendment proceeds, and to

avoid any misapprehension of what was decided" (*Carroll* v. *United States, supra,* p. 149), the Court in the *Boyd* case stated that pp. (623–624) "The search for and seizure of stolen or forfeited goods * * * are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto caelo.* In the one case, the government is entitled to the possession of the property; in the other it is not. * * * the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. * * * it is clear that the members of that body [the same Congress which proposed for adoption the original amendments to the Constitution] did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. * * * So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, * * * are not within this category. * * * Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for

the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, * * * is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution; * * *." This language, which was quoted with approval in the *Carroll* case, *supra,* pp. 149–150, plainly covers the seizure in the instant case and, as petitioner admits, recites instances of "official seizures in civil proceedings to which the protection of the Fourth Amendment does not extend" (Pet. 6). See *United States* v. *Eighteen Cases of Tuna Fish,* 5 F. (2d) 979 (W. D. Va.); *United States* v. *Eight Boxes, Etc.,* 105 F. (2d) 896 (C. C. A. 2); *Murray's Lessee et al.* v. *Hoboken Land & Imp. Co.,* 18 How. 272.

The above noted exception relative to the applicability of the Fourth Amendment to seizures of forfeited goods states a conclusion based on numerous cases, recent and otherwise, which reveal that the exception applies even though the goods are not forfeited at the time of the seizure. Unlike Section 304 of the Federal Food, Drug, and Cosmetic Act and like seizure cases in admiralty, statutes such as the prohibition, customs, and tariff acts have authorized forfeiture proceedings *preceded by* an initial executive seizure of the property.[3] In such cases, as this Court has

[3] It was early held that an initial, executive seizure was a condition precedent to the jurisdiction of the federal courts in seizure cases in admiralty, because the Judiciary Act of

stated, "anyone may seize any property for forfeiture to the Government, and * * * if the Government adopts the act and proceeds to enforce the forfeiture by legal process, this is of no less validity than when the seizure is by authority originally given. * * * The owner of the property suffers nothing that he would not have suffered if the seizure had been authorized. * * * We can see no reason for doubting the soundness of these principles when the forfeiture is dependent upon subsequent events any more

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September 24, 1789, gave those courts jurisdiction in cases of "seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas" (*The Ann*, 9 Cr. 289, 290), and forfeiture statutes have generally followed this procedure. See, e. g., *The Motor Vessel "K-22845,"* 55 F. (2d) 666, 669 (E. D. N. Y.), affirmed, 55 F. (2d) 671; *United States* v. *A Quantity of Contraband Liquor, Etc.*, 47 F. (2d) 321, 325 (W. D. Pa.); *United States* v. *George Spraul & Co.*, 185 Fed. 405 (C. C. A. 6). In contrast, Section 304 of the Federal Food, Drug, and Cosmetic Act provides that "The article shall be liable to seizure *pursuant to the libel*" [italics supplied] and therefore requires no initial, executive seizure to give the court jurisdiction to condemn the article. See *United States* v. *Capon Water Co.*, 30 F. (2d) 300 (E. D. Pa.); *United States* v. *George Spraul & Co.*, *supra*. The failure to recognize this fact in *United States* v. *Eight Packages and Casks of Drugs*, 5 F. (2d) 971 (S. D. Ohio), was the basis of the only decision we are aware of, outside of the opinion of the district court in the instant case, which holds that the Fourth Amendment is applicable to a seizure under Section 304 of the Federal Food, Drug, and Cosmetic Act. The decision is, of course, overruled by the opinion of the circuit court of appeals in the instant case.

than when it occurs at the time of the seizure, * * *. The exclusion of evidence obtained by an unlawful search and seizure stand on a different ground" (*Dodge* v. *United States,* 272 U. S. 530, 532; see also, *United States* v. *One Ford Coupe,* 272 U. S. 321, 325; *Wood* v. *United States,* 16 Pet. 342, 359; *Gelston* v. *Hoyt,* 3 Wheat. 246, 310). The court has also held that it is immaterial in such cases that the seizure was irregular, illegal, or not well founded. *Woods* v. *United States, supra,* p. 358; *Taylor* v. *United States,* 3 How. 197, 205; *The Merino,* 9 Wheat. 391, 403; *The Richmond,* 9 Cr. 102. In consonance with these decisions, some of the lower federal courts have specifically held that an initial, unlawful search and seizure does not divest the district courts of jurisdiction in a condemnation of forfeiture proceeding.[4] Fundamentally, all of these decisions recognize the inapplicability of the Fourth Amendment to the seizure of an article proceeded against in an *in rem* proceeding, the underlying principle being, it appears, that

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[4] See *United States* v. *Pacific Finance Corporation,* 110 F. (2d) 732, 733 (C. C. A. 2); *United States* v. *Eight Boxes, Etc., supra; Strong* v. *United States,* 46 F. (2d) 257 (C. C. A. 1), appeal dismissed per stipulation, 284 U. S. 691; *Bourke* v. *United States,* 44 F. (2d) 371 (C. C. A. 6), certiorari denied, 282 U. S. 897; *United States* v. *One Lot of Intoxicating Liquor,* 27 F. (2d) 903, 904 (S. D. Tex.). *Contra: United States* v. *A Quantity of Contraband Liquor, Etc.,* 47 F. (2d) 321 (W. D. Pa.); *Ghisolfo* v. *United States,* 14 F. (2d) 389 (C. C. A. 9); *Pappas* v. *Lufkin,* 17 F. (2d) 988 (D. Mass.).

the amendment does not secure property the right to which may be taken away "by some public law * * * for the sake of justice and the general good" (see *Boyd* v. *United States, supra,* p. 627).[5]

CONCLUSION

The decision of the circuit court of appeals was clearly correct and does not conflict with the decision of any court outside that circuit. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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[5] There is nothing in Section 304 (c) (21 U. S. C. 334) which, in terms, authorizes the use of samples of the tomato puree in a criminal proceeding against petitioner (see Pet. 6). That section relates to the obtaining of samples for use in a condemnation proceeding. The question whether such a sample may, subsequent to condemnation, be used in a criminal proceeding against petitioner, if such a proceeding would lie (cf. Sec. 304 (a) (21 U. S. C. 331)), is, of course, not involved in this case.

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